Supreme Court, U.S.
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90-79

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD B. KAY,

Petitioner,

v.

BREMER EHRLER AND THE
KENTUCKY BOARD OF ELECTIONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether a losing defendant may avoid the payment of attorney's fees under 42 U.S.C. § 1988 solely because the action was brought by an attorney who represented himself.

PARTIES TO THE PROCEEDINGS

There are no petitioners or respondents in addition to those named in the caption.

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v.

BREMER EHRLER AND THE KENTUCKY BOARD OF ELECTIONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Richard B. Kay respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-11a) is reported at 900 F.2d 967. The opinion of the district court (App., *infra,* 12a-17a) and the report and recommendation of the magistrate (*id.* at 19a-28a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1990 (App., *infra,* 29a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1988, as amended by the 1976 Civil Rights Attorney's Fees Awards Act, provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

Petitioner, an attorney, brought a federal lawsuit on his own behalf in January of 1988 challenging the constitutionality of various Kentucky statutes governing the Commonwealth's presidential primaries. Approximately one year later, the district court granted summary judgment in petitioner's favor on virtually all of his substantive claims. Nonetheless, the court denied petitioner's request for attorney's fees under the 1976 Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, on the ground that an attorney who represents himself is ineligible for such fees (App., *infra,* 16a). In a split decision, the court of appeals affirmed the denial of attorney's fees (*id.* at 1a-11a).

1. The present lawsuit is actually petitioner's second challenge to the constitutionality of Kentucky's presidential primary statutes. Petitioner, a resident of Florida, has on more than one occasion run as a candidate for the office of President. Early in 1980, petitioner notified the Kentucky Board of Elections (the "Board") that he wished to appear on the Kentucky Democratic presidential primary ballot pursuant to Ky. Rev. Stat. § 118.580 (repealed in 1982). That statute provided that the Board shall nominate and place on the ballot presidential primary candidates, but it limited that opportunity, for those not qualifying by petition, to "all those [who are] generally advocated and nationally recognized" presidential candidates. On

April 2, 1980, the Board met to select names for the presidential primary ballot. At that meeting it determined that petitioner should not be placed on the ballot. Twelve days later, petitioner, acting pro se, filed suit in federal district court, alleging that Ky. Rev. Stat. § 118.580 was unconstitutional because of its "potential for discriminatory treatment of persons such as the [petitioner]." *Kay* v. *Mills,* 490 F. Supp. 844, 850 (E.D. Ky. 1980).

On April 23, 1980, the district court entered a preliminary injunction prohibiting the printing or distribution of Kentucky Democratic primary ballots that did not include petitioner's name. Nine days later, the court issued an opinion holding the statute unconstitutional. *Kay* v. *Mills, supra.* As a remedy, the court ordered that petitioner's name be placed on the ballot. 490 F. Supp. at 854-55. Although petitioner was the prevailing party and handled the case pro se, he did not seek attorney's fees.

2. After the district court rendered its decision, the Kentucky General Assembly repealed Ky. Rev. Stat. § 118.580. In 1986, however, it adopted an identically worded statute: Ky. Rev. Stat. § 118.581. App., *infra,* 21a.

On August 10, 1987, petitioner announced that he would again run for President. Four months later, he wrote to the Kentucky Secretary of State,[1] requesting that his name be presented to the Board for a decision on whether his name should be placed on the primary ballot. On January 11, 1988, petitioner was notified that because he was not a "nationally recognized" candidate, his name would not appear on the ballot. App., *infra,* 20a.

The following day, petitioner, again appearing pro se, filed the present lawsuit under the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution and under 42 U.S.C. §§ 1981, 1983, 1985, and 1988. He requested that Ky. Rev. Stat. § 118.581 be declared unconstitutional; that his name be

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1. At the time, the Secretary of State was Drexel Davis. Davis was later succeeded by respondent Bremer Ehrler. App., *infra,* 2a & n.1.

placed on the Commonwealth's presidential preference primary scheduled for March 8, 1988; that his "candidates' deposit" of $1,000 be refunded; and that the Kentucky statute governing candidates' deposits—Ky. Rev. Stat. § 118.611—be declared unconstitutional on the ground that it discriminated against candidates who do not receive a certain percentage of total votes.[2] App., *infra*, 1a-2a. On January 13, 1988, respondents—having ascertained that petitioner was the same person who had successfully filed suit in 1980—notified petitioner that his name had in fact been placed on the ballot (*id.* at 20a).

Subsequently, both petitioner and respondents moved for summary judgment on petitioner's remaining claims (App., *infra*, 2a). The district court referred the matter to a magistrate, who filed a report on September 13, 1988 (*id.* at 19a-28a). In his report, the magistrate stated that petitioner's lawsuit was not moot—even though the election was over and petitioner's name had appeared on the ballot—because "[t]he laws in question remain on the books and the problem posed for voters and future candidates, including [petitioner], remains unsolved without action" (*id.* at 20a-21a (citation omitted)). Relying on *Kay* v. *Mills*, *supra*, the magistrate recommended that Ky. Rev. Stat. § 118.581 be declared unconstitutional. He noted that "[t]he law has no greater constitutional support now than it did in 1980 . . . ." App., *infra*, 21a. Regarding the candidates' deposit statute, the magistrate found that Ky. Rev. Stat. § 118.611 violated the Due Process and Equal Protection Clauses because it "impose[d] fees only on minority candidates" (*id.* at 24a).

Although the magistrate stated that petitioner should be awarded "litigation costs" under 42 U.S.C. § 1988, he recommended that petitioner be denied his request for attorney's fees

2. Ky. Rev. Stat. § 118.611 provided that if a candidate failed to receive three percent of the vote cast in his party's primary, the $1,000 candidates' deposit would "escheat to the Commonwealth and be placed in a special trust and agency fund to be used by the secretary of state to defray election expenses."

under that statute. The magistrate reasoned that the latter issue was controlled by the Sixth Circuit's decision in *Falcone* v. *IRS*, 714 F.2d 646 (6th Cir. 1983), *cert. denied*, 466 U.S. 908 (1984), which held that a pro se attorney was ineligible for attorney's fees in an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(E). App., *infra*, 27a-28a.

Both petitioner and respondents filed objections to the magistrate's report. The district court, after considering the objections *de novo*, concluded that the magistrate's recommendations were "correct in all respects" and thus adopted them as its own. App., *infra*, 12a. The court thus held that both Ky. Rev. Stat. § 118.581 and Ky. Rev. Stat. § 118.611 were unconstitutional. On the issue of attorney's fees, the court summarily rejected petitioner's argument, noting simply that the magistrate had correctly analyzed the issue. App., *infra*, 16a.

3. Petitioner appealed the denial of attorney's fees to the Sixth Circuit. In a published opinion, the Sixth Circuit affirmed, with Judge Jones dissenting (App., *infra*, 1a-11a). The court acknowledged at the outset that while most circuits had denied attorney's fees under 42 U.S.C. § 1988 to nonlawyers appearing pro se, "courts have seen quite a different issue when the pro se civil rights plaintiff was also an attorney" (App., *infra*, 5a). The court noted that the cases were divided, with most courts concluding that a pro se attorney is entitled to attorney's fees under 42 U.S.C. § 1988 (*id.* at 5a-6a & n.2).

The court pointed out that several courts addressing the issue had looked for guidance to attorney's fees case law under the FOIA (App., *infra*, 6a-7a). In that context as well, the court acknowledged, the decisions were divided (*id.* at 7a). Nonetheless, since the Sixth Circuit, in *Falcone* v. *IRS*, *supra*, had specifically held that pro se attorneys could not recover fees in the FOIA context, the court felt bound to follow that decision in the context of section 1988 (*id.* at 7a-9a).

The court also concluded that the "plain language" of section 1988 "assumes a paying relationship between an attorney and a client" (App., *infra*, 8a). Furthermore, the court stated

that under *Falcone*, attorney's fees should not be allowed for a variety of policy reasons, including the risk of creating a "cottage industry" of inactive lawyers filing pro se civil rights cases; because "opportunity costs [do not] constitute actual pecuniary losses for which [pro se attorney] litigants should be compensated"; and because attorneys who handle their own cases cannot screen them objectively to eliminate meritless ones. *Id.* at 7a (citing 714 F.2d at 647-48). Finally, the court noted that "[w]hile we cannot condone the Commonwealth's conduct in this case, attorney's fees, as [petitioner] concedes, under section 1988 are not awarded as penalties or sanctions" (App., *infra*, 9a).

Judge Jones dissented (App., *infra*, 9a-11a). While he "[did] not challenge *Falcone*'s reading of the statutory purposes underlying the FOIA," he stated that "the concern [raised in *Falcone*] with 'objective' lawsuits and a cottage industry of fee-generating lawyers is not as great [under section 1988] . . ." (App., *infra*, 10a-11a).[3]

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question concerning the entitlement to attorney's fees under 42 U.S.C. § 1988. Rejecting the approach of two other circuits, the Sixth Circuit has ruled that an attorney appearing pro se is not entitled to attorney's fees under that statute. The decision below, if allowed to stand, would frustrate Congress's objective of ensuring vigorous enforcement of the civil rights laws. Furthermore, the decision has implications that extend far beyond section 1988, since numerous other attorney's fees statutes contain identical or similar language. This Court's review is plainly warranted.

1. Several circuits have considered whether an attorney appearing pro se is entitled to attorney's fees under various federal statutes. The resulting decisions are sharply divided. *See*

3. On May 16, 1990, the Sixth Circuit denied petitioner's motion for extension of time for filing a petition for rehearing (App., *infra*, 30a).

Jones v. *Lujan*, 883 F.2d 1031, 1038-39 (D.C. Cir. 1989) (Silberman, J., concurring) (noting that "[t]he courts of appeals are hopelessly divided" and that "Supreme Court review is most appropriate").[4] The court below acknowledged this conflict (*see* App., *infra*, 5a-7a), and respondents have conceded it as well (*see* Resp. C.A. Br. 9).

In contrast to the Sixth Circuit, both the Eleventh and the Ninth Circuits have held that attorney's fees for pro se attorneys are permitted under section 1988. *Duncan* v. *Poythress*, 777 F.2d 1508, 1516 (11th Cir. 1985) (*en banc*), *cert. denied sub nom., Poythress* v. *Kessler*, 475 U.S. 1129 (1986);[5] *Ellis* v. *Cassidy*, 625 F.2d 227, 230-31 (9th Cir. 1980).

In *Duncan*, the attorney-plaintiff had previously prevailed in her claim that the refusal of Georgia officials to call a special election to fill a State Supreme Court vacancy violated her right to vote. The sole issue before the Eleventh Circuit was whether she was entitled to attorney's fees. After explaining that neither the language nor the legislative history of section 1988 precluded an award of attorney's fees to a pro se attorney, the court concluded that the purposes of the statute favored such an award. It noted that "[m]erely because plaintiff . . . need not pay an actual fee . . . does not mean that she is able to spend the time and pay the overhead involved in this case, absent at least the hope of remuneration." 777 F.2d at 1511-12. The court also cited the "anomaly" that any other person raising plaintiff's voting rights claim could have hired plaintiff, and she would have been entitled to attorney's fees. *Id.* at 1513. Furthermore, the court rejected the argument that

4. *See also* Note, *Awarding Attorney's Fees to Prevailing Pro Se Litigants*, 80 Mich. L. Rev. 1111, 1112 (1982) ("[T]he courts of appeals have reached conflicting conclusions on this issue."); Note, *To Fee, or Not to Fee: The Dilemma of the Pro Se Attorney in Collecting Attorney's Fees*, 16 W. St. U.L. Rev. 303, 315 (1988) (noting inter-circuit conflict and urging the Supreme Court to "resolve this critical issue").

5. Chief Justice Burger, joined by Justice White, dissented from the denial of certiorari in *Poythress*, noting that review was warranted because of inter-circuit conflicts on closely related issues, including the entitlement of pro se attorneys to fees under the FOIA. 475 U.S. at 1129-30.

a pro se attorney "lack[ed] the objectivity necessary to provide a check against groundless or frivolous litigation," *id.* at 1514, and noted that the concern for competent legal representation, which warranted prohibiting attorney's fees for nonlawyers, was inapplicable to lawyers. *Id.* at 1513.

Similarly, in *Ellis,* the Ninth Circuit held that various attorneys who successfully defended a civil rights suit filed against them were entitled to attorney's fees.[6] The *Ellis* court pointed out that the attorneys "actually suffered pecuniary loss" by having to take time away from their practices to defend the case, that they in fact performed legal services, and that "[t]he difficulty of placing a dollar value on the legal services performed, present in the situation where a lay defendant represents himself, is largely absent in the case of an attorney who has established fees and billing practices." 625 F.2d at 230-31.[7]

The decision below is squarely and irreconcilably in conflict with the decisions of the Eleventh Circuit in *Duncan* and the Ninth Circuit in *Ellis.* Unless this Court resolves the conflict, a pro se attorney's entitlement to fees will depend on the fortuity of which court has jurisdiction over the case.

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6. Although the pro se attorney was the defendant rather than the plaintiff, its reasoning is applicable in either context. *See Duncan,* 777 F.2d at 1510 (relying on *Ellis*).

7. Although the Fifth Circuit has not squarely addressed the issue in the specific context of section 1988, it recently suggested in dictum that it would follow the approach taken in *Duncan* and *Ellis:* "Under the law of this circuit, a pro se litigant who is an attorney by profession may receive attorney's fees in cases in which attorney's fees are authorized by statute." *McLean* v. *Int'l Harvester Co.,* 902 F.2d 372, 374 & n.9 (5th Cir. 1990) (referring to the FOIA as an "example"). The Seventh and the District of Columbia Circuits have not addressed the issue under section 1988, but district courts in those circuits have done so, with conflicting results. *Shakman* v. *Democratic Org. of Cook County,* 634 F. Supp. 895, 901 (N.D. Ill. 1986) (allowing pro se attorneys to recover attorney's fees under 42 U.S.C. § 1988); *Rybicki* v. *State Bd. of Elections,* 584 F. Supp. 849, 860 (N.D. Ill. 1984) (same); *Lawrence* v. *Staats,* 586 F. Supp. 1375, 1380-81 (D.D.C. 1984) (refusing to award such fees).

Review in this Court is also important because a similar conflict exists with respect to cases arising under the Freedom of Information Act's attorney's fees provision, 5 U.S.C. § 552(a)(4)(E).[8] Both the Fifth and the District of Columbia Circuits permit attorney's fees for pro se attorneys under the FOIA, whereas the First and Sixth Circuits have held that such fees are not permitted. *Compare Cazalas* v. *United States Dep't of Justice,* 709 F.2d 1051, 1057 (5th Cir. 1983), *Cox* v. *United States Dep't of Justice,* 601 F.2d 1, 5-6 (D.C. Cir. 1979), *and Cuneo* v. *Rumsfeld,* 553 F.2d 1360, 1366 (D.C. Cir. 1977), *with Aronson* v. *Dep't of Housing and Urban Dev.,* 866 F.2d 1, 4-6 (1st Cir. 1989), *and Falcone* v. *IRS,* 714 F.2d 646, 648 (6th Cir. 1983), *cert. denied,* 466 U.S. 908 (1984). *See* Note, *Attorney Fees, Freedom of Information, and Pro Se Litigants: Per Se Prohibitions Frustrate Policies,* 26 Wm. & Mary L. Rev. 349, 350 (1985) (noting inter-circuit conflict in the FOIA context).[9] Resolution of the conflict with respect to the implementation of section 1988 is also likely to resolve this conflict in the FOIA cases.

2. The issue in this case is unquestionably one of great importance, as the considerable law review commentary has recognized. *See, e.g.,* authorities cited in note 4, *supra.* Moreover, as the case law demonstrates, it has arisen frequently, and pro se attorneys have been responsible for redressing important constitutional violations. *See, e.g., Duncan* v. *Poythress, supra* (violation of voters' rights by failure of Georgia officials to declare special election); *Rybicki* v. *State Bd. of Elections of State of Ill.,* 584 F. Supp. 849 (N.D. Ill. 1984) (successful challenge

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8. That provision, which is similar to 42 U.S.C. § 1988, provides that "[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E).

9. While the Fourth Circuit has not considered the issue under the FOIA, it has held that a pro se attorney is not entitled to attorney's fees under the Truth in Lending Act, 15 U.S.C. § 1640(a). *White* v. *Arlen Realty & Development Corp.,* 614 F.2d 387, 388-89 (4th Cir.), *cert. denied,* 447 U.S. 923 (1980).

to legislative redistricting plan for election of candidates to Illinois General Assembly). Indeed, this case strongly illustrates the point: petitioner fought and won two lawsuits challenging Kentucky's system for placing presidential primary candidates on the ballot. The issue, as the magistrate noted, was one that affected not just petitioner but also "voters and future candidates" (App., *infra*, 20a). By holding that pro se attorneys are ineligible for attorney's fees, the Sixth Circuit has removed a significant incentive for such individuals to litigate civil rights violations.

The decision below, if interpreted broadly, could preclude attorney's fees not only to pro se lawyers but also to businesses, public interest organizations, and other entities whose in-house counsel bring civil rights actions.[10] Whether or not it is applied to such entities, the decision below, if not corrected, will have implications extending far beyond section 1988. There are more than 100 federal statutes authorizing attorney's fees, *see Marek* v. *Chesny*, 473 U.S. 1, 44-51 (1985) (Brennan, J., dissenting) (collecting statutes), and many of them contain wording that is identical or similar to section 1988. Indeed, section 1988 was patterned after the attorney's fees provisions in Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), 42 U.S.C. § 2000e-5(k), and contains wording that in all relevant respects is identical to those statutes. *See* 121 Cong. Rec. 26806 (1975) (statement by Sen. Tunney, sponsor of § 1988, noting connection to Titles II and VII); *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 758 n.5 (1980) (noting that § 1988 and Title VII "authorize fee awards in identical language, and Congress acknowledged the close connection between the two statutes when it approved § 1988"). The wording of section 1988 is also essentially identical to the Voting Rights Act attorney's fees provision, 42 U.S.C.

10. The Third Circuit, apparently the only court of appeals to consider explicitly the issue of pro se lawyers in the organizational context, upheld the award of attorney's fees. *Delaware Valley Citizens' Council for Clean Air* v. *Pennsylvania*, 762 F.2d 272, 278 (3d Cir. 1985), *aff'd in part and rev'd in part on other grounds*, 478 U.S. 546 (1986).

§ 1973(*l*)(e). *See* 121 Cong. Rec. 26806 (1975) (statement of Sen. Tunney noting identical language in section 1988 and Voting Rights Act).[11] Thus, the interpretation of section 1988 is likely to govern those statutes as well.

3. On the merits, the court below seriously erred in denying attorney's fees to pro se attorneys under section 1988. Contrary to the court's assertion that the "plain language" of section 1988 "assumes a paying relationship between an attorney and a client" (App., *infra*, 8a), nothing in that statute even refers to a client, let alone to a paying relationship.[12] The awarding of attorney's fees to pro se lawyers is entirely consistent with the statutory language—which simply permits the court to award "the prevailing party . . . a reasonable attorney's fee as part of the costs." *Cf. Jones* v. *Lujan*, 883 F.2d at 1035 (noting, in awarding fees to pro se attorney, that language of Equal Access to Justice Act "in no way rules out an attorney legitimately representing himself").

Moreover, the policies of the statute strongly support the awarding of fees in such cases. In enacting section 1988, Congress made clear that "[t]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976), at 1; *see also* 122 Cong. Rec. 31471 (1976) (statement of Sen. Scott) ("Congress should encourage citizens to go to court in private suits to vindicate its policies and protect their rights."). The denial of attorney's fees to pro se attorneys undermines Congress's intent by reducing the incentive for an important category of litigants to expose civil rights violations.

11. Several other attorney's fees statutes, while not identical to section 1988, contain wording that, for all practical purposes, is indistinguishable. These include, among others, the Equal Access to Justice Act, 28 U.S.C. § 2412(b) and (d); the Truth in Lending Act, 15 U.S.C. § 1640(a)(3); and the Copyright Act, 17 U.S.C. § 505.

12. This Court has made clear that the absence of a paying relationship is not relevant to the question of attorney's fees: "Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization." *See Blum* v. *Stenson*, 465 U.S. 886, 891 (1984).

Finally, while there may be policy arguments for not awarding attorney's fees to nonlawyers who represent themselves, such arguments are inapplicable to pro se attorneys. First, Congress's goal of ensuring that civil rights victims are effectively represented, *see* 122 Cong. Rec. 31471 (1976) (testimony of Sen. Scott); *Owens-El* v. *Robinson*, 694 F.2d 941, 942-943 (3d Cir. 1982), is not jeopardized if the person filing the claim is a trained attorney. Second, "[t]he difficulty in placing a dollar value on the legal services performed" does not arise when the party is a lawyer, who typically "has established fees and billing practices." *Ellis, supra*, 625 F.2d at 231. Third, since section 1988 authorizes attorney's fees only for the "prevailing" party, attorneys would not be encouraged to bring frivolous lawsuits. In any event, if a patently meritless suit were brought, there are adequate sanctions, such as Federal Rule of Civil Procedure 11, to address the problem.

In sum, the Sixth Circuit has misread the language of section 1988, misapplied its purposes, and failed to recognize the critical distinctions between pro se lawyers and pro se nonlawyers. This erroneous decision should not be permitted to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 11, 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-5297

RICHARD B. KAY, PLAINTIFF-APPELLANT,

v.

BREMER EHRLER, AND THE KENTUCKY BOARD OF ELECTIONS,
DEFENDANTS-APPELLEES.

Argued Feb. 9, 1990.
Decided April 13, 1990.

Before: JONES and MILBURN, Circuit Judges; and BELL, District Judge.*

MILBURN, Circuit Judge.

The district court denied plaintiff-appellant Richard B. Kay's petition for attorney's fees on the ground that an attorney who represents himself cannot recover fees pursuant to 42 U.S.C. § 1988. For the reasons that follow, we AFFIRM.

I.

A.

Kay, proceeding *pro se*, initiated this action by filing a complaint and a motion for a temporary restraining order and preliminary injunction on January 12, 1988. He brought his action under the First, Fifth, Sixth, and Fourteenth Amendments and 42 U.S.C. §§ 1973, 1981, 1983, 1985 and 1988, alleging that several Kentucky statutes that govern the state's presidential preference primaries violated his constitutional rights. He

*Honorable Robert Holmes Bell, United States District Judge for the Western District of Michigan, sitting by designation.

requested that the district court declare Ky.Rev.Stat.Ann. §§ 118.581 and 118.611 to be unconstitutional; place his name on the ballot for the state's presidential preference primary scheduled for March 8, 1988; and order the state to refund his "candidates' deposit" of $1,000 required by section 118.611. He named Kentucky Attorney General Fred Cowan and the Kentucky Secretary of State at the time, Drexel Davis, as defendants.

On January 14, 1988, newly installed Secretary of State Bremer Ehrler notified Kay that the Kentucky Board of Elections had agreed to place his name on the Democratic primary ballot. This action rendered Kay's request for injunctive relief moot.[1]

After discovery, both Kay and the defendants moved for summary judgment. The district court referred the matter to the magistrate, who filed a report on September 13, 1988. He recommended that Ky.Rev.Stat.Ann. §§ 118.581 and 118.611 be declared unconstitutional; that the state refund Kay's deposit; and that Kay be awarded his "litigation costs," but not attorney's fees. Kay filed an objection to the denial of his petition for fees with the district court, and the defendants requested clarification of the phrase "litigation costs."

On January 19, 1989, the district court entered an order adopting the magistrate's recommendations and making additional findings of fact. The district court agreed with the defendants that Kay's "litigation costs" included only his actual court costs, and not the costs he incurred in personally traveling from Florida to Kentucky to file his pleadings. The district court also agreed with the magistrate that under the applicable Sixth Circuit precedent, *pro se* attorney-plaintiffs may not recover attorney's fees pursuant to 42 U.S.C. § 1988. On

1. Kay filed a second amended complaint on March 10, 1988, wherein he dropped Davis as a defendant and named Ehrler, who replaced Davis in January 1988. He also added the Kentucky Board of Elections as a defendant.

February 22, 1989, the district court amended its order of January 19, 1989, and ordered the defendants to return Kay's deposit. Kay then filed this timely appeal.

B.

Kay is a resident of the State of Florida, a licensed attorney, and a registered member of the Democratic Party in Palm Beach County, Florida. He announced on August 10, 1987, that he would seek the Democratic nomination for the office of President of the United States. This was at least the second time he had sought the nomination, as he was also a candidate in 1980. *See Kay* v. *Mills,* 490 F. Supp. 844 (E.D. Ky. 1980).

In December 1987, Kay wrote to Kentucky Secretary of State Davis, asking that his name be presented to the Board of Elections at its meeting on January 8, 1988. State election laws provided that when the board met in January, it would decide which candidates would appear on the ballot for the upcoming presidential primary.

On January 2, 1988, elections officials notified Kay that pursuant to state elections laws, the elections board had decided that candidates who wished to appear on the presidential primary ballot had to be "nationally recognized." Furthermore, the board had decided that it would deem those candidates who had been certified by the Federal Elections Commission for matching federal campaign funds to be "nationally recognized." Kay did not qualify for federal matching funds, and the board did not name him to the primary ballot.

None of this was new to Kay, who encountered similar difficulties when he sought a place on the Kentucky presidential primary ballot in April 1980. He challenged the constitutionality of Ky.Rev.Stat.Ann. § 118.580, prevailed, and the district court ordered that his name be placed on the ballot. *See Kay* v. *Mills,* 490 F. Supp. 844 (E.D. Ky. 1980).

In 1982, the Kentucky General Assembly repealed section 118.580 and in 1986, it enacted section 118.581, which Kay challenges in this litigation. The state concedes that section

118.581 is "essentially the same statute" as the unconstitutional one it replaced.

On January 14, 1988, two days after Kay filed this action, the elections board placed his name on the primary ballot. The parties continued to engage in discovery into Kay's challenge to the election laws until August 1988.

Before the magistrate, Kay prevailed on nearly all of his claims, including his civil rights claims. Nevertheless, the magistrate explained that we had held that an attorney *pro se* litigant could not recover attorney's fees under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)E). *See Falcone* v. *IRS,* 714 F.2d 646, 648 (6th Cir. 1983), *cert. denied,* 466 U.S. 908, 104 S.Ct. 1689, 80 L.Ed.2d 162 (1984). The magistrate concluded that "it is unlikely the Sixth Circuit would reach a different conclusion on this issue specifically under section 1988 unless it chooses to somehow distinguish the application of the reasoning in *Falcone.*" Accordingly, the magistrate recommended that Kay's petition for attorney's fees be denied, and the district court so ordered.

The sole issue presented in this appeal is whether a *pro se* plaintiff who is an attorney and who prevails on a civil rights claim is entitled to attorney's fees pursuant to section 1988.

II.

This is an appeal of the district court's conclusions of law, which are subject to de novo review. *Loudermill* v. *Cleveland Bd. of Educ.,* 844 F.2d 304, 308 (6th Cir.), *cert. denied,* ____ U.S. ____, 109 S.Ct. 363, 102 L.Ed.2d 353 (1988).

A.

It is settled law in the majority of circuits that non-attorney plaintiffs who proceed *pro se* and prevail in civil rights actions cannot recover attorney's fees under section 1988. *See Gonzalez* v. *Kangas,* 814 F.2d 1411, 1412 (9th Cir. 1987) and cases cited therein. This decision rests on the intent of section 1988, which was passed to ensure that litigants who prevailed on

claims based upon 42 U.S.C. §§ 1981–85 could recover the costs of their attorneys' services. *See Pitts* v. *Vaughn,* 679 F.2d 311, 312 (3d Cir. 1982); *see also* S.Rep. No. 94–1011, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S.Code Cong. & Admin.News 5908, 5910. The courts have held that section 1988 was not intended to reward or compensate *pro se* litigants, as it "presupposes a relationship of attorney and client" that does not exist when the plaintiff proceeds *pro se. See Davis* v. *Parratt,* 608 F.2d 717, 718 (8th Cir. 1979) (per curiam).

However, courts have seen quite a different issue when the *pro se* civil rights plaintiff was also an attorney. Four of the five courts that have addressed this issue have held that a *pro se* plaintiff-attorney can recover attorney's fees under section 1988 for representing himself. The leading case is *Duncan* v. *Poythress,* 777 F.2d 1508 (11th Cir. 1985) (en banc), *cert. denied,* 475 U.S. 1129, 106 S.Ct. 1659, 90 L.Ed.2d 201 (1986), wherein the court held that an attorney who became a plaintiff in the latter stages of the litigation of a section 1983 claim could recover attorney's fees under section 1988 for the time she spent representing herself.

In *Duncan,* the court found it significant that section 1988 does not expressly bar such an award. It noted that awarding fees to *pro se* attorneys furthered several of the purposes of section 1988, including encouraging private citizens to act as private attorneys general and serve the public interest by bringing suits to vindicate civil rights. *Duncan,* 777 F.2d at 1512; *see also Hamilton* v. *Daley,* 777 F.2d 1207, 1211 (7th Cir. 1985).

The court also cited the opportunity costs of bringing a *pro se* action as a reason to award fees. *Duncan,* 777 F.2d at 1514. Opportunity costs consist primarily of the time and energy an attorney spends on the *pro se* case, overhead, and other fixed costs. The concept of opportunity costs rests on the assumption that the *pro se* attorney has an otherwise full load of work, and he or she would have been busily billing hours to clients but for his *pro se* work. In *Duncan* the court held that opportunity costs constitute actual, pecuniary losses incurred while

vindicating constitutional and congressional policies—the precise situation that section 1988 was intended to address—and, therefore, *pro se* attorneys may recover fees under section 1988.[2]

The only reported decision to deny attorney's fees is *Lawrence* v. *Staats*, 586 F. Supp. 1375, 1380–81 (D.D.C. 1984). The court found no reason to distinguish between *pro se* laymen plaintiffs, who cannot recover under section 1988, and *pro se* plaintiffs who happened to be licensed to practice law. The court also rejected the opportunity costs argument on the ground that section 1988 was not intended to compensate attorneys for the opportunity costs involved in prosecuting a lawsuit, but only for those legal services that were related to providing the prevailing claims. *Id.* at 1379.

B.

Several of the courts that have faced the issue of awarding fees to *pro se* attorneys under section 1988 have looked for guidance in decisions interpreting other federal statutory fee provisions. The majority of these interpretive decisions have involved the Freedom of Information Act, which provides in part:

> (E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

5 U.S.C. § 552(a)(4)(E).

Nine circuits, including the Sixth Circuit, have held that *pro se* non-attorney plaintiffs cannot recover attorney's fees under the FOIA. *See Aronson* v. *United States Dep't of Hous. and*

2. Other decisions which have allowed *pro se* attorneys to recover attorney's fees under section 1988 include *Ellis* v. *Cassidy*, 625 F.2d 227, 230–31 (9th Cir. 1980); *Shakman* v. *Democratic Org. of Cook County*, 634 F. Supp. 895, 901 (N.D. Ill. 1986); *Lanasa* v. *City of New Orleans*, 619 F. Supp. 39, 45 (E.D. La. 1985); *Rybicki* v. *State Bd. of Elections*, 584 F. Supp. 849, 860 (N.D. Ill. 1984).

Urban Dev., 866 F.2d 1, 4 (1st Cir. 1989) and cases cited therein.

Four courts have considered whether *pro se* plaintiff-attorneys may recover fees under the FOIA. This circuit and the First Circuit have held that they cannot; the D.C. and Fifth Circuits have held they can. *Compare Aronson*, 866 F.2d at 4–5 and *Falcone* v. *IRS*, 714 F.2d 646, 648 (6th Cir. 1983), *cert. denied*, 466 U.S. 908, 104 S.Ct. 1689, 80 L.Ed.2d 162 (1984) *with Cazalas* v. *United States Dep't of Justice*, 709 F.2d 1051, 1057 (5th Cir. 1983), and *Cox* v. *United States Dep't of Justice*, 601 F.2d 1, 5–6 (D.C.Cir. 1979).

We held in *Falcone* that fees should not be awarded because *pro se* plaintiffs who are also attorneys do not incur the type of legal costs contemplated by the statutory provision for fees. *Falcone*, 714 F.2d at 647. In reaching this holding, we rejected the proposition that opportunity costs constitute actual pecuniary losses for which litigants should be compensated. *Id.* at 648.

We explained in *Falcone* that one purpose of a statutory provision for attorney's fees is "to encourage potential claimant to seek legal advice before commencing litigation," with the hope that "the retention of legal counsel might help to prevent unnecessary litigation." *Id.* at 647. However, this filtering does not occur where the attorney represents himself. In reaching our holding, we also cited the concern that awarding fees to a *pro se* attorney would lead to the establishment of a "cottage industry" of inactive lawyers who would support themselves on statutory fee awards for self-generated litigation. We explained that "[w]e do not believe that Congress intended to so subsidize attorneys without clients." *Id.* at 648 (footnote omitted). We concluded that "[t]he fortuitous fact that [a prevailing] FOIA plaintiff is also an attorney makes no difference. Both a client and an attorney are necessary ingredients for an award of fees in a FOIA case."[3] *Id.*

3. The First Circuit found our arguments in *Falcone* to be persuasive and followed them in 1989. *See Aronson*, 866 F.2d at 6.

C.

The magistrate concluded in this case that Kay's petition for attorney's fees fell within *Falcone* and denied it. We agree, based upon our rejection in *Falcone* of the proposition that opportunity costs constitute actual pecuniary losses for which a *pro se* attorney deserves compensation. As we stated in *Falcone,* "no legal costs are incurred" by *pro se* plaintiffs who are also attorneys. *Falcone,* 714 F.2d at 647. Assuming that Kay spent hours prosecuting this case that he could have billed to clients, he has only failed to add to the wealth of his private practice. He has not incurred any expenses for legal representation, and, therefore, he cannot recover under section 1988.

Falcone is a FOIA case, but that does not distinguish it from this appeal. Were we to hold that Kay's opportunity costs constituted pecuniary losses, when we had previously held that Falcone's opportunity costs were not, we would begin classifying opportunity costs as legal expenses based upon the substance of the *pro se* claim. We find no authority for awarding fees based on such a system.

There are several other reasons why Kay should not recover fees under section 1988. First, while *Duncan* emphasized the lack of an expressed prohibition against awarding fees to *pro se* attorneys in section 1988, we held in *Falcone* that the "plain language" of a statutory provision for attorney's fees assumes a paying relationship between an attorney and a client. *Falcone,* 714 F.2d at 648.

Second, while some courts have found the purposes of section 1988 are fulfilled when an attorney "hires himself" to litigate a civil rights claim, we stressed in *Falcone* that where the advocate is also the claimant, there is no filtering of meritless claims by objective attorneys, and, therefore, one of the major objectives of the statutory provision for attorney's fees was frus[illegible]ted. *Id.* at 647. Additionally, we held in *Falcone* that the fact that the public might benefit from a *pro se* attorney's action did not make him more deserving of fees than a *pro se* non-attorney plaintiff. *Id.* at 648.

Kay argues that he is entitled to the fees because the commonwealth of Kentucky has engaged in the vexatious modification of its election laws. He points out that he brought an identical action in 1980, and won, and has had to repeat that effort here. While we cannot condone the Commonwealth's conduct in this case, attorney's fees, as Kay concedes, under section 1988 are not awarded as penalties or sanctions.

III.

We held in *Falcone* that when an attorney represents himself, he does not incur any legal costs or pecuniary losses that constitute "attorney's fees." Though *Falcone* was an FOIA case, we hold that its rationale applies to section 1988 as well. It is clear to us that the *pro se* plaintiff-attorneys in this case vindicated a constitutional right, the substance of which is clearly distinguishable from the substance of the matter in *Falcone.* Nevertheless, for the reasons we have explained, we feel bound to follow the rationale of *Falcone* in this case. Accordingly, for the foregoing reasons, the judgment of the district court is AFFIRMED.

JONES, Circuit Judge, dissenting.

Because I believe that *Falcone* v. *IRS,* 714 F.2d 646 (6th Cir. 1983) is distinguishable, I respectfully dissent.

The *Falcone* court held that an attorney litigant could not recover attorney's fees for successful release of documents under the Freedom of Information Act (FOIA) for three reasons. First, "[t]he award of attorney's fees to successful FOIA plaintiffs was intended to relieve plaintiffs with legitimate claims of the burden of legal costs; it was not intended as a reward for successful claimants or as a penalty against the government." *Id.* at 647. "A second reason [in *Falcone*] for denying fees to *pro se* FOIA plaintiffs is that the provision for attorney's fees was intended to encourage potential claimants to seek legal advice. . . . It was hoped that retention of legal counsel might help prevent unnecessary litigation. An attorney

who represents himself in litigation may have the necessary legal expertise but is unlikely to have the 'detached and objective perspective' necessary to fulfill the aims of the Act." *Id.* The final rationale of *Falcone* was that providing attorney's fees to attorney-litigants would create a "cottage industry" for claimants using the Act solely as a way to generate fees rather than to vindicate personal claims. The *Falcone* court reasoned that Congress did not intend to "subsidize attorneys without clients." *Id.* at 648.

The majority reads *Falcone* as a rejection of "the proposition that opportunity costs constitute actual pecuniary losses for which litigants should be compensated," and therefore holds that *Falcone* precludes the award of attorney's fees in the instant case. However, a close reading of *Falcone* indicates that it did not explicitly reject the opportunity costs rationale. Instead, the *Falcone* court noted that "[a]lthough such a rule may negate the fear of inactive attorneys bringing FOIA claims solely to generate fees, it would produce difficult problems of proof. In any event, the rule is unsatisfactory because it does not address the other reasons which have led us to deny fees to *pro se* litigants." *Id.* That the opportunity costs rule does not address the first two concerns of the *Falcone* court is not a rejection of the argument.

The rationale of *Falcone* is inapplicable to section 1988 suits for attorney's fees. The purpose of section 1988 is to encourage lawyers "to search for violations of constitutional and statutory rights and then seek to vindicate those rights. . . ." *Duncan* v. *Poythress,* 777 F.2d 1508, 1515 (11th Cir. 1985), *cert. denied,* 475 U.S. 1129, 106 S. Ct. 1659, 90 L.Ed.2d 201 (1986). In contrast to the FOIA, section 1988 not only relieves the burden of litigation, but also rewards successful litigants for vindicating a constitutional right. Moreover, because the goal of section 1988 is to promote lawsuits that protect civil rights, the concern with "objective" lawsuits and a cottage industry of fee-generating lawyers is not as great as with the FOIA, where the litigation secures the release of individual documents from

the government. I do not challenge *Falcone*'s reading of the statutory purposes underlying the FOIA. However, I believe that these purposes are not present to the same extent, if at all, under section 1988. As such, I would allow Richard Kay, plaintiff-appellant, to recover attorney's fees equivalent to the opportunity cost of handling other litigation.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

Civil Action No. 88-3

RICHARD B. KAY, PLAINTIFF

v.

BREMER EHRLER, SECRETARY OF STATE, ET AL., DEFENDANTS

[Filed Jan. 19, 1989]

ORDER AND JUDGMENT

This matter is before the court on the Report and Recommendation of the United States Magistrate, and the court has considered *de novo* those objections filed thereto by plaintiff and defendants.

The court concludes that the Report and Recommendation of the Magistrate is correct in all respects and hereby adopts same. In addition, the court makes the following findings of fact and conclusions of law regarding plaintiff's and defendants' objections to the Magistrate's Report and Recommendation.

First, the plaintiff sought to have this court declare that the method by which members of the Board of Election are appointed is unconstitutional under Kentucky law. The Magistrate found that because this claim was based on Kentucky law, the court could only reach this claim by an exercise of pendent jurisdiction. He further found that the question was dominated by state law and was not necessarily tied to the other claims raised in the action. The Magistrate

recommended that this claim be dismissed because federal courts lack jurisdiction to enjoin state officials to act according to state law, even for claims brought under pendent jurisdiction. The plaintiff asks the court to certify the question of the constitutionality of the composition of the Board of Elections to the Kentucky Supreme Court.

This issue, however, is not one which is appropriate for certification. Certification is part of the abstention doctrine of the federal courts and is used when state law is unclear or difficult to ascertain. C. Wright, *Law of the Federal Courts* § 52 (4th ed. 1983). In *Lehman Brothers* v. *Schein,* 416 U.S. 386 (1974), the United States Supreme Court endorsed the use of certification to state court in cases where state law is unclear. It held that certification was appropriate "to resolve the controlling state law on which the federal rule may turn." *Id.* at 390. It also stated, "We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory." *Id.* at 390-91.

This case is not controlled by an unclear issue of state law. Rather, Kentucky law on the issue of the composition of the Board of Elections is explicit, and is contained in the Kentucky Constitution. Thus, the issue is not one which falls under the ruling of *Lehman Brothers*, where state law was difficult to ascertain and had not been interpreted by a state court. In *Lehman Brothers*, the Court held that abstention and certification were proper. In this case, because state law is not unclear, neither abstention nor certification are appropriate.

The Magistrate recommended dismissal of this claim because federal courts lack jurisdiction to enjoin state officials from acting according to state law. *Pennhurst State School & Hospital* v. *Halderman,* 465 U.S. 89, 119-24 (1984). In *Pennhurst*, the Court held that the Eleventh Amendment barred a federal court from ordering state officials to conform their conduct to state law. *Id.* at 106. In this suit, plaintiff seeks an injunction ordering state officials to act according to state constitutional law in the composition of the Elections Board.

Clearly, under the Court's holding in *Pennhurst*, such an injunction is barred by the Eleventh Amendment.

Because the court has no jurisdiction to adjudicate the issue of the composition of the State Board of Elections under Kentucky law, it has no authority to certify the question to the Kentucky Supreme Court. Certification is only appropriate when the federal court has jurisdiction over the matter. Plaintiff concedes that "this question should be determined by the Supreme Court of Kentucky instead of under the legal basis of pendent jurisdiction." Plaintiff's Memorandum with Regard to Magistrate's Report and Recommendation, Docket Number 58, at 1. Therefore, the court will dismiss the claim, and deny the plaintiff's motion to certify the issue to the Kentucky Supreme Court.

Second, defendants object to the Magistrate's recommendation that plaintiff be awarded litigation costs. Section 1988 of 42 U.S.C. provides: "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981–1983, 1985, 1986], . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The [M]agistrate found that becuase [sic] the plaintiff was the prevailing party, he was entitled to "litigation costs" under section 1988 for his claims against KRS § 18.581 and KRS § 118.611. The defendants do not disagree with the Magistrate, but contend that the litigation costs should include only the actual court costs, and not the costs incurred by the plaintiff in traveling to and from Kentucky to file pleadings which could have been filed by mail.

Generally, costs and expenses unnecessarily incurred by the prevailing party are not assessed against the unsuccessful party. *Vincennes Steel Corporation* v. *Miller*, 94 F.2d 347 (5th Cir. 1938). In *Vincennes*, the Fifth Circuit held that a prevailing party could recover the costs and expenses of its witnesses who attended trial, even when the witnesses were subpoenaed but

did not testify. It stated that "the liability of the losing party to his adversary is confined to expenses actually incurred and which were necessary to the prosecution or defense of the action." *Id.*

Items which courts have allowed as costs include postage, *Hancock* v. *Albee*, 11 F.R.D. 139 (D. Conn. 1951); fees for probate court copies, *Dysart* v. *Remington Rand, Inc.*, 15 F.R.D. 60 (D. Conn. 1952), *cert. denied*, 348 U.S. 861 (1954); investigation and litigation expenses, *Schauffler* v. *United Ass'n of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry of U.S. and Canada, Local 420, AFL*, 148 F. Supp. 704 (E.D. Pa. 1956), *aff'd*, 246 F.2d 867 (3rd Cir. 1957); deposition expenses, *Concrete Mixing & Conveying Co.* v. *Great Western Power Co. of California*, 46 F.2d 331 (D. Cal. 1928), *appeal dism'd*, 48 F.2d 1072 (9th Cir. 1931); and fees and expenses of witnesses, *Donato* v. *Parker Pen Co.*, 7 F.R.D. 148 (S.D.N.Y. 1945); *Hansen* v. *City of Cordova*, 107 F. Supp. 594 (D. Alaska 1952). Items which federal courts have not allowed as costs include expenses incurred by a party in preparing for trial, *Hope Basket Co.* v. *Product Avancement Corp.*, 104 F. Supp. 444 (W.D. Mich. 1952); post office registration fees, *Department of Highways* v. *McWilliams Dredging Co.*, 10 F.R.D. 107 (W.D. La. 1950), *aff'd*, 187 F.2d 61 (5th Cir. 1951); costs incurred in using experts as consultants on technical matters, *Braun* v. *Hassenstein Steel Co.*, 23 F.R.D. 163 (D.S.D. 1959); and the cost of making copies which are not identified or used at trial, *Perlman* v. *Feldmann*, 116 F. Supp. 102 (D. Conn. 1953).

According to Rule 5 of the Federal Rules of Civil Procedure, filing of pleadings with the court and service on other attorneys may be done by mail. Personal filing is not required by either the Federal Rules or by the Joint Local Rules for the Eastern and Western Districts of Kentucky. Therefore, it was unnecessary for plaintiff to file his pleadings by any other method than mailing. Any expenses incurred in filing

pleadings with the court or with the defendants' attorneys by any method but mail were, consequently, unnecessary.

Plaintiff's expenses in traveling to Kentucky to file pleadings will not be allowed by the court. All other litigation expenses are granted.

Finally, plaintiff objects to the Magistrate's refusal to allow him attorney's fees. The Magistrate held that the plaintiff was not entitled to reasonable attorney's fees because he was a *pro se* litigant in the case. Plaintiff objects to this finding, and contends that attorney's fees for *pro se* litigants are proper and should be awarded. The Magistrate's analysis and conclusion on this issue is correct in all respects and the court hereby adopts same.

Therefore, for the above stated reasons,

IT IS ORDERED as follows:

1. That the objections to the Report and Recommendation of the United States Magistrate be, and they are, hereby overruled;

2. That the Report and Recommendation of the Magistrate, as supplemented by this Opinion, be, and it is, hereby adopted as the findings of fact and conclusions of law of the court;

3. That plaintiff's motion for summary judgment as to KRS § 118.581 be, and it is, hereby granted, and the said statute is declared to be unconstitutional;

4. That plaintiff's motion for summary judgment as to KRS § 118.611 be, and it is, hereby granted, and the said statute is declared to be unconstitutional;

5. That plaintiff's claim on the issue of the constitutionality of the composition of the Kentucky Board of Elections be, and it is, hereby dismissed due to lack of subject matter jurisdiction;

6. That plaintiff's motion to certify the fourth cause of action of plaintiff's complaint to the Supreme Court of Kentucky be, and it is, hereby denied;

7. That plaintiff be, and he is, hereby awarded costs herein consistent with this Report and Recommendation of the

Magistrate, as supplemented by this Opinion, but is denied attorney's fees herein; and

8. That defendants' motion for summary judgment be, and it is, hereby denied.

This 18th day of January, 1989.

WILLIAM O. BERTELSMAN, JUDGE

Copies w/notice of entry:
R. Kay
D. Ashley
Mag Hood
1/19/89
pm

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

Civil Action No. 88-3

RICHARD B. KAY, PLAINTIFF

v.

BREMER EHRLER, SECRETARY OF STATE, ET AL., DEFENDANTS

[Filed February 23, 1989]

ORDER

This matter is before the court on the motion of the plaintiff to amend the court's Judgment of January 19, 1989, to add a paragraph requiring return of the $1,000 deposited by plaintiff. No response having been filed thereto, the court assumes there is no opposition to this motion. Therefore, the court being advised,

IT IS ORDERED AND ADJUDGED AS FOLLOWS:

1. That said motion be, and it is, hereby GRANTED;

2. That the Judgment of January 19, 1989, be amended to add the following paragraph:

> That the defendants herein are ordered to return forthwith to the plaintiff the $1,000 deposited by the plaintiff with the defendants pursuant to KRS 118.611.

This the 22d day of February, 1989.

/s/
WILLIAM O. BERTELSMAN, Judge

Copies:
Richard B. Kay
David Ashley
2/23/89—mhy

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FOR THE DISTRICT OF FRANKFORT

Civil Action No. 88-3

RICHARD B. KAY, PLAINTIFF

v.

BREMER EHRLER, SECRETARY OF STATE, ET AL., DEFENDANTS

[Filed Sep. 12, 1988]

MAGISTRATE'S REPORT AND RECOMMENDATION

This matter comes before the undersigned on cross-motions for summary judgment. The plaintiff, a Democratic candidate for president at the time this action arose, claims several parts of the Kentucky presidential preference primary system are violative of his rights under the United States Constitution. He brings this action under the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution; 42 U.S.C. Sections 1981, 1983, 1985, 1988, *et seq.*; 42 U.S.C. Section 1973; and 28 U.S.C. Sections 1331 and 1343.

The plaintiff announced his candidacy for president on August 10, 1987. In December, 1987, he wrote former Kentucky Secretary of State Drexel R. Davis asking that his name be presented to the Board of Elections at its January 8, 1988 meeting. On January 2, 1988, the plaintiff was notified of a Board of Elections decision in September, 1987, setting the criteria necessary for a candidate to satisfy KRS 118.581 which requires would-be candidates to be "generally advocated and nationally recognized" in order to be placed on

the ballot without gathering a petition. The Board decided a person who had received Federal Election Commission certification for matching funds would fullfill the statutory standard. The plaintiff did not so qualify and was told on January 11 that he had not been nominated to the ballot by the Board. On January 12, the plaintiff filed this action and asked for a temporary restraining order against the Board. Defendant's [sic], meanwhile, discovered the plaintiff had been placed on the Kentucky ballot in 1980, after bringing a lawsuit challenging a very similar statute. The court ordered theat [sic] he be placed on the ballot, holding the language of the statute void for vagueness. According to the defendants, upon discovery of plaintiff's previous candidacy and without knowledge of this complaint, the Board voted to nominate the plaintiff to the ballot. The plaintiff was notified of that action on January 13 and his name was, in fact, on the ballot in the May presidential preference primary. Several arguments are presented to this court by the parties['] motions for summary judgment and will be considered here individually.

I. MOOTNESS

The first argument which must be addressed is the defendants['] contention that the relief which the plaintiff seeks was awarded him and, thus, no controversy remains for this court. The plaintiff urges that this matter falls within the "capable of repetition, yet evading review" exception.

The primary is now over and the plaintiff's name did appear on the ballot. However, the constitutionality of the challenged election procedures remains in question. Even assuming the defendants placed the plaintiff's name on the ballot without knowlege [sic] of his lawsuit, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953). The laws in question remain on the books and the problem posed for voters and future candidates, including the plaintiff,

remains unsolved without action. *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n. 2 (1972).

A similar situation was presented to the Supreme Court in *Storer* v. *Brown*, 415 U.S. 724 (1974), where the Court noted that "[t]he 1972 election in [sic] long over, . . . but this case is not moot since the issues properly presented, and their effects . . . will persist as the . . . statutes are applied in future elections.["] *Id.* at 737. The plaintiff was faced with identical statutory language in 1980 and was forced to adjudicate its merit. Now, the controversy returns and plaintiff will be confronted with its terms so long as the statute involved remains. Therefore, the case is not moot.

II. KRS 118.581

The crux of the plaintiff's case concerns the constitutionality of KRS 118.581. The language challenged reads:

> [T]he board shall nominate as presidential preference primary candidates all those generally advocated and nationally recognized as candidates of the political parties for the office of President of the United States.

KRS 118.581 (1986).

As earlier noted, this exact statutory language was the subject of a lawsuit by the plaintiff in 1980. In *Kay* v. *Mills*, 490 F. Supp. 844 (E.D. Ky. 1980), the court declared this identical language unconstitutionally vague. In 1982, the Kentucky General Assembly repealed KRS 118.580. Then, in 1986, the General Assembly enacted KRS 118.581 as it is challenged here. The law has no greater constitutional support now than it did in 1980 and once again must be held unconstitutionally void for vagueness.

The right to be a candidate has been recognized as correlative to the right to vote and to cast a vote for the candidate of one's choice. The United States Supreme Court has said:

> Restrictions on access to the ballot burden two distinct and fundamental rights, 'the right of individuals to

> associate for the advancement of political beliefs, and the right of qualified voters ... to cast their votes effectively'.

Illinois State Board of Elections v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979) (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968)). Likewise, the interest of the state in the stability of its political system is not only permissible, but is compelling. *Storer*, 415 U.S. at 736. As with any other matter, the state's power to regulate is limited by the rights guaranteed under the Constitution. Legitimate state interests "must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity ...." *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974).

The standard of review enunciated in several decisions of the Court is one of strict scrutiny requiring statutes which burden access to be necessary to further a compelling state interest, and narrowly tailored to achieve that goal. *Bullock* v. *Carter*, 405 U.S. 134, 144 (1972); *Illinois State Board of Elections*, 440 U.S., at 184. Some procedures have been held to survive examination under this standard, indicating a more balanced test may be the true measure. *See Munro* v. *Socialist Workers Party*, 479 U.S. 189 (1986). Nonetheless, although the right of a candidate to ballot access may not necessarily be entitled to the rigorous standard of review given disenfranchisement cases, restrictions on that access must be justified by important state interests at a minimum. *Kay* v. *Austin*, 621 F.2d 809, 811 (6th Cir. 1980).

In light of these concepts, the reasoning of the court in *Mills* remains valid and the result in that case is dispositive of this issue. The facts and law can in no way be distinguished from the present case. In fact, the defendants make no attempt to do so. The flaw in the statute remains the same, i.e., a lack of criteria by which compliance with its language may be measured. The Board chose federal matching fund

qualification. It could just have easily made up any other criterion without offending the statute. As the *Mills* court noted, "[t]hose attempting to comply with it ... must necessarily guess at its meaning, and make important decisions based on such unavoidable guesswork." 490 F. Supp. at 852. The court found the major defect to be that "[n]o standards appear anywhere; no narrowly drawn limitations; no circumscribing of the absolute power ...." *Mills*, 490 F. Supp. at 853. This defect must be corrected in order for the statute to serve its purpose correctly. As was stated in *Mills*:

> This is not to say that national recognition is not a valid, rational basis for placing a candidate on a presidential ballot, or that a state administrative agency may not be vested with the power to decide what candidates have met such a standard. This court holds only that this discretion may not be uncontrolled.

490 F. Supp. at 853. For these reasons, the undersigned recommends that KRS 118.581 be declared unconstitutional and void for vagueness and that the defendants be permanently enjoined from enforcing the statute as it exists.

III. KRS 118.611

The plaintiff next contends that KRS 118.611 pertaining to filing fees for candidates on the ballot is discriminatory in its application violating the equal protection and due process clauses of the Constitution. The statute, enacted in 1986 with the previously discussed provision, requires a $1,000 deposit from candidates who are nominated for the ballot in presidential preference primaries. The plaintiff objects to the second part of the statute which reads:

> (2) If the candidate fails to receive three percent (3%) or more of the total popular vote cast in the presidential preference primary of his party, the one thousand dollars ($1,000) deposit shall escheat to the Commonwealth and be placed in a special trust and

> agency fund to be used by the secretary of state to defray election expenses.

KRS 118.611 (1986).

This provision in effect imposes a filing fee which all candidates must pay before they may appear on the ballot. The plaintiff does not seriously argue that a state may not constitutionally require a filing fee. Moreover, it is clear by the Supreme Court's specific ruling in *Bullock*, 405 U.S. 134 (1972), that filing fees do not, in general, violate the constitutional rights of those who seek to become candidates.

The impact of the fee refund is apparently a question of first impression in the federal courts. The plaintiff argues the provision is discriminatory because its effect is to penalize minority candidates who do not receive the required votes, while major candidates are in reality not required to pay any fee. The defendants point to an important interest in defraying the cost of the election, contending that the state is unwilling to bear the total expense for candidates with no opportunity to win. They also urge the commonly cited policies of protecting the election process from nonserious candidates, creating managable [sic] ballots, and avoiding voter confusian.

As noted earlier, the statute must be carefully scrutinized and balanced against any infringement upon voting and the right of association. While perfect equality is not required, the state must have some compelling interest for any burden placed on minority candidates. *Williams*, 393 U.S. at 31. The interests of the defendants are clearly among those which have been held sufficient to outweigh the candidate's right to ballot access in certain cases. *See Bullock*, 405 U.S. at 145; *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

The burden imposed by this statute and the interests purported to be served by it do not match in this case. In reality, the effect of this provision is to impose fees only on minority candidates. If the statute expressly required this result, it would undoubtedly be unconstitutional. The conclusion is no different when state tries to do indirectly what

cannot be accomplished directly. The statute, in a sense, punishes candidates for not getting enough votes. Any state interest in uncluttered ballots and serious candidates must be satisfied *before* the candidate gets on the ballot. Here, the impact of the restriction continues after the state interest ceases. Although the candidate's access has been granted, it is burdened with proof of support at the ballot box. If the required support[1] does not materialize, then the candidate is forced to pay for the exercise of his rights while other candidates are not so compelled.

The courts have recognized only that states have an interest in a *preliminary* showing of support by the candidate before gaining access to the ballot. *Illinois State Board of Elections*, 440 U.S. at 185. Once that access has been granted, no interest has been recognized which allows the state to come back and place a penalty on a few of the candidates. The defendants' contention that the refund system helps defray the costs of the primary is not logical. That interest is obviously better served by a non-refundable fee, which at the same time would avoid the imposition of a discriminatory burden.

The defendants also argue that the Eleventh Amendment bars any relief for the plaintiff on this issue. The plaintiff seeks the return of his deposit and a permanent injunction against enforcement of the statute. The Eleventh Amendment does not ordinarily bar federal courts from requiring state officers to comply with federal injunctions. *Ex parte Young*, 209 U.S. 123 (1908); *see also Mills*, 409 F. Supp. at 847. It is true that monetary judgments against the state's coffers are generally barred by the amendment. *Id.* However, this case is obviously distinguishable because the money the plaintiff seeks is his own. Under the terms of the statute, it is merely a "deposit" the return of which will not come from the state treasury. Interest on the deposit sought by the plaintiff is not provided

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1. There is no indication why three percent of the popular vote is the required support level. Though this cutoff point appears somewhat arbitrary, the plaintiff does not raise the issue.

for by the statute, therefore that relief cannot be granted as it would be barred by the Eleventh Amendment.

The undersigned recommends that KRS 118.611 be held unconstitutional as violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution, that the defendants be permanently enjoined from enforcing the statute, and that the plaintiff's $1,000 deposit be returned.

IV. Composition of the State Election Board

The plaintiff's fourth cause of action seeks to have this court declare the method by which members of the Board of Election are appointed unconstitutional under Kentucky law. He does not make any claim of unconstitutionality under the United States Constitution, nor does he raise any other federal question in relation to this issue. The only support cited by the plaintiff is a Kentucky case and an opinion of the Kentucky Attorney General.

This court could only reach this claim by an exercise of pendent jurisdiction, though the plaintiff does not specifically argue the invocation of such authority. The question here is one particularly dominated by state law and is not necessarily tied to the other claims raised in this action. The Supreme Court said in the landmark case of *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966):

> [I]f it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.

Id. at 725.

The Supreme Court has clearly ruled that federal courts lack jurisdiction to enjoin state officials to act according to state law, even for claims brought under pendent jurisdiction. *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 119-24 (1984). Therefore, the undersigned recommends

that this claim be dismissed due to lack of subject-matter jurisdiction. [A]ttorney fees and costs sought by the plaintiff on this issue cannot be granted due to the lack of jurisdiction.

V. Costs and Attorney Fees

The final issue to address is plaintiff's claim for costs and attorney fees under 42 U.S.C. Section 1988 as a result of this action. The defendants again raise the Eleventh Amendment as a defense, asserting that the imposition of costs and attorney fees is a monetary judgment against the state prohibited by the amendment. Although a federal court may not directly order a state to act, state officials can be enjoined by the federal court from unconstitutional acts. *Ex parte Young*, 209 U.S. at 156. "In an injunctive action grounded on federal law, the state's immunity can be overcome by naming state officials as defendants. Monetary relief that is 'ancillary' to injunctive relief also is not barred by the eleventh amendment." *Kentucky* v. *Graham*, 473 U.S. 159, 169 n. 18 (1985) (citation omitted).

The defendants here are all named in their official capacity and, as such, are not entitled to Eleventh Amendment immunity in section 1983 suits for costs and attorney fees.

The plaintiff is an attorney proceeding *pro se* in this matter, raising another question as to his entitlement to attorney fees under section 1988. Jurisdictions are split on this issue. Compare *Duncan* v. *Poythress*, 777 F.2d 1508 (11th Cir. 1985) (attorney litigants are entitled to fees) with *Lawrence* v. *Staats*, 586 F. Supp. 1375 (D.D.C. 1984) (attorney-plaintiff not entitled to fees).

The Sixth Circuit has held that non-attorney *pro se* litigants are not entitled to attorney fees under section 1988. *Wright* v. *Crowell*, 674 F.2d 521 (6th Cir. 1982). In an analogous case, a panel of the Sixth Circuit held that attorney *pro se* litigants under the Freedom of Information Act are not entitled to fees. *Falcone* v. *Internal Revenue Service*, 714 F.2d 646 (6th Cir. 1983), *cert. denied* 466 U.S. 908, 104 S.Ct. 1689 (1984). The

reasoning was much the same as is argued under section 1988. The court based its ruling on the fact that the fees are intended as compensation for legal costs actually incurred and said that no such costs are incurred by attorney litigants. The court also stated that payment of fees encourages claimants to seek legal advice. *Pro se* attorneys are "unlikely to have the 'detached and objective perspective' necessary to fulfill the aims of the Act." *Id.* at 647. Finally, the court stated, "[w]e do not believe that Congress intended to so subsidize attorneys without clients." *Id.* at 648 (footnote omitted). Thus, it is unlikely the Sixth Circuit would reach a different conclusion on this issue specifically under section 1988 unless it chooses to somehow distinguish the application of the reasoning in *Falcone.*

Accordingly, the undersigned recommends that the plaintiff be awarded litigation costs under section 1988 for his claims against KRS 118.581 and KRS 118.611, however no costs may be awarded for that part of this action over which the court has no jurisdiction. Under Sixth Circuit authority, the plaintiff is not entitled to attorney fees.

Particularized objections to this Report and Recommendation must be filed within ten (10) days of the date of service of the same or further appeal is waived. *Thomas* v. *Arn*, 728 F.2d 813 (6th Cir. 1984), *aff'd*, 474 U.S. 140 (1985); *Wright* v. *Holbrook*, 794 F.2d 1152, 1154-55 (6th Cir. 1986). A party may file a response to another party's objections after being served with a copy thereof. Rule 72(b), Fed.R.Civ.P.

This the 12th day of September, 1988.

/s/
JOSEPH M. HOOD
United States Magistrate

Date of Entry and Service:
Richard Kay
David Ashley
9-13-88

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-5297

RICHARD B. KAY, PLAINTIFF-APPELLANT,

v.

BREMER EHRLER, AND THE KENTUCKY BOARD OF ELECTIONS, DEFENDANTS-APPELLEES.

[Filed April 13, 1990]

JUDGMENT

Before: JONES and MILBURN, Circuit Judges; and BELL, District Judge.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/
Clerk

A True Copy.

Attest:

/s/
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Richard B. Kay
1080 E. Indiantown Road
Jupiter, FL 33477

May 16, 1990

RE: 89-5297
Kay vs. Ehrler
District Court No. 88-00003

Dear Counsel:

This letter is to advise that your motion to extend the time for filing a petition for rehearing has been denied.

Very truly yours,
Leonard Green, Clerk

(Mrs.) Yvonne Henderson
Deputy Clerk

cc: David Ashley